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MAY 16 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0292
	)	2 CA-CR 2011-0298
Appellee,	)	(Consolidated)
	)	DEPARTMENT A
v.	)	
	)	MEMORANDUM DECISION
ARMANDO BERNAL,	)	Not for Publication
	)	Rule 111, Rules of
Appellant.	)	the Supreme Court
	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CR201000457 and CR201000735 (Consolidated)

Honorable James L. Conlogue, Judge

AFFIRMED

Mark A. Suagee, Cochise County Public Defender
By Mark A. Suagee
Bisbee
Attorneys for Appellant

B R A M M E R, Judge

¶1 Armando Bernal appeals from the trial court's September 2011 orders revoking his probation and sentencing him to concurrent, presumptive prison terms, the longer of which is ten years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969),

stating he "has found no credible issue to raise on appeal," and asking us to review the record for "potential error." Bernal has not filed a supplemental brief.

¶2 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety and are satisfied it supports counsel's recitation of the facts. Viewed in the light most favorable to upholding the trial court's finding of multiple probation violations, *see State v. Vaughn*, 217 Ariz. 518, n.2, 176 P.3d 716, 717 n.2 (App. 2008), the evidence establishes the following.

¶3 Pursuant to separate plea agreements, Bernal was convicted in 2010 of attempted sexual contact with a minor under fifteen years old, a dangerous crime against children, *see* A.R.S. §§ 13-1410(A), 13-1001(C)(2), 13-705, and second-degree burglary,[1] *see* A.R.S. § 13-1507(A). The trial court suspended the imposition of sentence and placed Bernal on intensive probation for a period of five years. Bernal was incarcerated on three different occasions in 2010 and 2011 pursuant to the deferred incarceration sanctions provided in his plea agreements. In April 2011, the probation department filed a petition to revoke Bernal's probation,[2] alleging he had violated multiple conditions. After a contested hearing, the court found Bernal had violated his probationary terms by using marijuana on more than one occasion, failing to perform community service duties, failing to report to the probation office, leaving his place of

[1]The two matters have been consolidated on appeal.

[2]The trial court previously had declined to find a violation on an earlier petition to revoke probation.

residence without authority, and changing his place of residence without approval while his whereabouts were unknown.

¶4 A probation violation may be established by a preponderance of the evidence, Ariz. R. Crim. P. 27.8(b)(3), and we will uphold a trial court's finding of a violation "unless it is arbitrary or unsupported by any theory of evidence." *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980). The court's findings here were supported by the record, and the sentences imposed upon the revocation of Bernal's probation were within the range authorized by law.[3] *See* A.R.S. §§ 13-702, 13-705(J), (O).

¶5 Despite having found no legal issues to raise on appeal, counsel nonetheless states he "considered" two issues. He questions whether the trial court should have imposed a mitigated or partially mitigated sentence, and whether there was sufficient evidence to support Bernal's use of marijuana while he was on probation. In regard to the first "argument," counsel asserts Bernal's "'track record' [on probation] . . . and the multiple incarcerations prior to the revocation, as well as the number of violations in such a short time after the first Petition to Revoke Probation, did not appear" to support his argument. And, in regard to the second argument, counsel points out that not only did

[3]The written sentencing order provided the trial court had found "circumstances sufficiently substantial to call for a slightly mitigated term as indicated on the following page. These circumstances are stated by the Court on the record." However, the court did not impose a slightly mitigated sentence "on the following page." Instead, it imposed a presumptive sentence, the same sentence it imposed at the sentencing hearing. In fact, at sentencing, the court noted it was required by statute to impose the "harsh" ten-year penalty it was imposing. Generally a court's oral pronouncement of sentence controls over the written minute entry in the event of a conflict. *See State v.Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989). We find that to be so here.

Bernal violate other conditions of his probation in addition to those related to the use of marijuana, but the preponderance of the evidence standard required to prove probation violations "did not suggest a viable issue" even as to the marijuana violations. Accordingly, to the extent counsel may have raised any claims on appeal, for the reasons stated in his own arguments, they are without merit.

¶6 In accordance with our obligation under *Anders*, we have reviewed the record for fundamental, reversible error and have found none. We thus affirm the trial court's findings of probation violations, its revocation of Bernal's probation, and the sentences imposed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge